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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF SANTA CLARA**  
**AT SAN JOSÉ**

SAN JOSE POLICE OFFICERS'  
ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSÉ, BOARD OF  
ADMINISTRATION FOR POLICE AND FIRE  
DEPARTMENT RETIREMENT PLAN OF  
CITY OF SAN JOSE, and DOES 1-10,  
inclusive,

Defendants.

AND RELATED CROSS-COMPLAINT AND  
CONSOLIDATED ACTIONS

Consolidated Case No. 1-12-CV-225926

*[Consolidated with Case Nos. 1-12-CV-225928,  
1-12-CV-226570, 1-12-CV-226574,  
1-12-CV-227864, and 1-12-CV-233660]*

ASSIGNED FOR ALL PURPOSES TO:  
JUDGE PATRICIA LUCAS  
DEPARTMENT 2

**MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF MOTION  
FOR ATTORNEYS' FEES**

Hearing Date: September 25, 2014  
Hearing Time: 9:00 a.m.  
Courtroom: 2  
Judge: Honorable Patricia Lucas  
Action Filed: June 6, 2012  
Trial Date: July 22, 2013

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff/Petitioner Local 101 of the American Federation of State, County and Municipal  
4 Employees (“AFSCME” or “Plaintiff”) represents the non-safety, “miscellaneous” workers employed  
5 by the Defendant/Respondent City of San José (“City”). AFSCME brought the instant action in order  
6 to vindicate the rights of City employees, former employees and retired members to receive  
7 retirement benefits under the City Charter in affect prior to its alteration by “The Sustainable  
8 Retirement Benefits and Compensation Act,” or “Measure B.” AFSCME prevailed on its challenge  
9 to sections 1506-A, 1507-A, and 1510-A of Measure B and now seeks an award of attorneys’ fees  
10 under Code of Civil Procedure section 1021.5 (“Section 1021.5”). Plaintiff is entitled to attorneys’  
11 fees pursuant to Section 1021.5 because the instant action enforced an important right affecting the  
12 public interest and conferred a significant benefit on a large class of persons, AFSCME’s actual costs  
13 exceed the benefit it expected to receive through litigation, and the equities are in its favor.<sup>1</sup>

14 **II. STATEMENT OF FACTS**

15 AFSCME members earn and receive their retirement benefits under the “1975 Federated City  
16 Employees Retirement Plan” or the “Federated City Employees’ Retirement Plan” (“Plan”). It is a  
17 defined benefit pension plan established by the City for its employees and administered by a  
18 retirement Board of Administration under the auspices of the San José Federated Employees’  
19 Retirement System (“System”). (*See* San José Municipal Code § 3.28.010 (“SJMC” or “Code”).)  
20 Members of the Federated System do not receive Social Security benefits for their City service.

21 As is relevant here, pursuant to the pre-Measure B City Charter and Municipal Code,  
22 AFSCME members were never required to contribute towards the Plan’s unfunded accumulated  
23 actuarial liability (“UAL”). Furthermore, they were eligible to receive the defined benefit after  
24 reaching the earlier of fifty-five (55) years of age with five (5) years of covered service or thirty (30)  
25 years of service. Upon retiring, qualifying Federated System members (“members”) received a  
26

27 

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<sup>1</sup> AFSCME also incorporates by reference, where pertinent, the arguments made by Plaintiff/Cross-  
28 Defendant San José Police Officers’ Association in support of a fee award in this case.

1 defined benefit of 2.5% of final compensation multiplied by years of service as well as a flat three  
2 percent (3%) annual cost of living adjustment (“COLA”).

3 However, Measure B detrimentally altered the aforementioned retirement benefits. Section  
4 1506-A of Measure B requires employees who refuse to opt-into a “Voluntary Election Program”  
5 (“VEP”) under Section 1507-A, to contribute up to sixteen percent of their pensionable pay to the  
6 System in order to pay up to 50% of the pension system’s already-incurred UALs. Members who are  
7 unable or unwilling to pay such additional amounts must be placed into the VEP and are not required  
8 to contribute towards the System’s incurred UAL. Rather, they will see a drastic reduction in  
9 benefits, including a lower pension accrual rate, an unfavorable redefinition of “final compensation”  
10 for purposes of determining their pension annuity, a reduction in the COLA, and a later eligibility  
11 date for service retirement. Furthermore, Section 1510-A gives the City authority to suspend COLA  
12 payments for up to five years upon declaring a “fiscal and service level emergency” If the City  
13 chooses to restore the COLA, it unfixes it for those who remain in the Tier 1 plan and, for those who  
14 opt-into the VEP, it subjects it to the conditions set forth in the VEP provision (§ 1507-A). Finally,  
15 in relevant part, Section 1512-A(a) stated, “Existing and new employees must contribute a minimum  
16 of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.”

17 AFSCME successfully challenged Sections 1506-A, 1507-A, and 1510-A of Measure B as  
18 constituting unconstitutional impairments of contract. Furthermore, the Court found merit to  
19 AFSCME’s argument and struck the phrase “a minimum of” from Section 1512-A(a). AFSCME  
20 now seeks from the City an award of the attorneys’ fees it incurred because of this litigation.

### 21 **III. PROCEDURAL POSTURE**

22 On June 5, 2012, a majority of the City’s electorate that participated in the election approved  
23 Measure B. That same day, and prior to the voters enacting Measure B, the City filed a declaratory  
24 relief action in federal court, naming AFSCME as one of the defendants in that suit.

25 Subsequent to the enactment of Measure B, AFSCME and several other plaintiffs filed suit  
26 with this Court challenging Measure B pursuant to several state constitutional provisions and  
27 common law doctrines, most notably, the Contracts Clause of the California Constitution. (Cal.  
28 Const. Art. I, § 9). AFSCME sought declaratory relief, a writ of mandate, and a permanent injunction

1 prohibiting the City from implementing Measure B. In its complaint, it prayed for attorneys' fees and  
2 costs.

3 The individual state court cases were related, and the City subsequently filed a motion to  
4 consolidate the state court actions and to stay them in favor of its prematurely-filed federal court  
5 action. AFSCME and the other plaintiffs opposed the City's motion, and the Court ultimately denied  
6 the motion to stay the action but consolidated the individual cases under Consolidated Case No. 1-12-  
7 CV-225926.

8 Eventually, the City voluntarily dismissed its federal court lawsuit and filed a cross-complaint  
9 against the state court plaintiffs seeking a declaration that Measure B did not violate several  
10 provisions of the United States Constitution. Next, the City filed a motion for judgment on the  
11 pleadings ("MJP") and a motion to strike as to several plaintiffs, including AFSCME, and AFSCME  
12 opposed the motions. The Court denied the motion to strike and denied the MJP as to all but two of  
13 the causes of action challenged, one alleging an unconstitutional Bill of Attainder and another  
14 alleging an unlawful *Ultra Vires* Tax. AFSCME filed a First Amended Complaint to correct the  
15 defects in its original pleading identified by the Court, and the City demurred to the aforementioned  
16 causes of action. AFSCME opposed the demurrer, and the Court sustained the demurrer without  
17 leave to amend with respect to the cause of action alleging an unlawful *Ultra Vires* Tax.

18 Meanwhile, the City filed a Motion for Summary Adjudication as to sections 1506-A, 1511-  
19 A, and 1512-A of Measure B. AFSCME and the other plaintiffs successfully opposed the motion in  
20 its entirety, and the parties proceeded to trial. Prior to trial, AFSCME deposed several of the City's  
21 expert witnesses and defended the depositions of several witnesses it intended to call at trial, and the  
22 parties submitted to the Court detailed pre-trial briefs. From July 22-26, 2013, the Court conducted a  
23 bench trial, and the parties submitted post-trial briefs and proposed statements of decision after its  
24 conclusion. Subsequently, the Court conducted an additional day of hearing during which it  
25 questioned the parties regarding their post-trial briefing and legal theories.

26 On December 20, 2013, the Court issued its Tentative Decision. AFSCME filed objections to  
27 the tentative decision and responded to the City's request for a different statement of decision. On  
28 February 20, 2014, the Court issued its Statement of Decision. After the parties all submitted

1 separate proposed judgments, the Court ordered that they submit one form of judgment or a statement  
2 as to how each form differs. Subsequently, the parties met and conferred and submitted a statement  
3 highlighting the points of disagreement as to the judgment proposed by plaintiffs and that proposed  
4 by defendant. AFSCME also filed objections to the City's proposed judgment.

5 The Court entered final judgment on April 30, 2014. In that judgment, the Court stated:

6 The Court finds that each party obtained some but not all of its  
7 litigation objectives, and therefore concludes that there is no prevailing  
8 party. Accordingly, the Court exercises its discretion and orders that  
each party bear its own costs. (Cal. Civ. Proc. Code § 1032(a)(4) ("the  
court, in its discretion, may allow costs or not").)

#### 9 IV. ARGUMENT

10 AFSCME meets the requirements for a fee award pursuant to Section 1021.5 and is, therefore,  
11 entitled to a fee award pursuant to that code section.

#### 12 A. Code of Civil Procedure Section 1021.5 Entitles Petitioner to an Attorneys' Fees Award

13 An award of fees to AFSCME for success in this lawsuit is appropriate under Code of Civil  
14 Procedure Section 1021.5 (hereinafter "Section 1021.5"). Section 1021.5 provides, in part:

15 Upon motion, a court may award attorneys' fees to a successful party  
16 against one or more opposing parties in any action which has resulted  
in the enforcement of an important right affecting the public interest if:  
17 (a) a significant benefit, whether pecuniary or nonpecuniary, has been  
conferred on the general public or a large class of persons, (b) the  
18 necessity and financial burden of private enforcement, or of  
enforcement by one public entity against another public entity, are such  
19 as to make the award appropriate, and (c) such fees should not in the  
interest of justice be paid out of the recovery, if any.

20 Here, AFSCME's action meets each of the requirements of section 1021.5, and therefore the  
21 court should grant the fees motion for that reason as well.

#### 22 1. AFSCME Is a Successful Party

23 As detailed above, AFSCME successfully challenged three significant sections of Measure B,  
24 which the Court ultimately rendered unconstitutional. Thus, AFSCME is a successful party for  
25 purposes of recovering attorneys' fees in this case.

26 "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they  
27 succeed on any significant issue in litigation which achieves some of the benefit the parties sought in  
28 bringing suit." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292 (quoting *Hensley v. Eckerhart* (1983)



1 461 U.S. 424, 433) (hereinafter “*Riles*”); *see also Robinson v. City of Chowchilla* (2011) 202  
2 Cal.App.4th 382, 393 (partially successful party may recover attorneys’ fees).) The California  
3 Supreme Court explained, “The appropriate benchmarks in determining which party prevailed are (a)  
4 the situation immediately prior to the commencement of suit, and (b) the situation today, and the role,  
5 if any, played by the litigation in effecting any changes between the two....” (*Riles, supra*, 43 Cal.3d  
6 at 1291-92 (citations omitted) (emphasis in original).) Clearly, under this standard the Plaintiffs are  
7 prevailing parties.

8 Under the standard articulated forth by the *Riles* Supreme Court, there is no question that  
9 Plaintiffs are prevailing parties. The situation immediately preceding the filing of AFSCME’s  
10 lawsuit was a sweeping first-of-its-kind law that, if left unchallenged, would dramatically alter city  
11 employee, former city employee and retiree benefits (AFSCME filed its Complaint on July 25, 2012,  
12 after the City Clerk had certified the results of the election enacting Measure B).

13 Next, AFSCME prevailed on a most significant issue in this case by successfully proving that  
14 the San José City Charter did not preclude the creation of vested pension rights, as the City averred.  
15 Secondly, prior to AFSCME’s suit, the City charter contained language, by way of Measure B,  
16 substantially reducing its employees’ and retirees’ retirement security and drastically impairing their  
17 vested rights to pension benefits. If the sections of Measure B deemed unconstitutional by the Court  
18 were permitted to stand, thousands of City employees and retirees would have suffered reduced take-  
19 home pay due to increased pension contributions, a lower pension benefit, and/or a decreased COLA  
20 benefit. This would have significantly altered their financial security. However, AFSCME’s lawsuit  
21 resulted in the rendering as unconstitutional these major provisions of the post-Measure B charter.

22 Prevailing party status is especially justified because the portions of Measure B the Court  
23 struck down are unequivocally contrary to decades of Supreme Court precedent. In fact, these  
24 sections were so patently unconstitutional that the City essentially conceded at trial that it had no  
25 legal authority to support its theory allegedly justifying the impairment of contract caused by  
26 Measure B (a fact the Court recognized in its Statement of Decision). (See Trial Transcript,  
27 p. 128:12-27; Declaration of Teague Paterson concurrently filed in Support of Cost of Proof Motion,  
28 ¶ 22, Exh. G, p. 16:2-17 (Court’s Statement of Decision entered 2/20/14).) Courts are likely to award

1 attorney fees when a plaintiff is forced to prosecute a suit challenging the application of a patently  
2 unconstitutional statute. (*See Schmid v. Lovette* (1984) 154 Cal.App.3d 466 (trial court properly  
3 awarded fees where district enforced non-Communist loyalty oaths deemed unconstitutional by prior  
4 court decisions); *see also Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762,  
5 767, 772 (fee award justified when party continues to litigate “frivolous, unreasonable, or  
6 groundless” claim; also awarding costs on appeal); *State ex rel. Standard Elevator Co. v. West Bay*  
7 *Builders, Inc.* (2011) 197 Cal.App.4th 963, 972, 981, 984 (“clearly frivolous” nature of action  
8 justified award of fees; also affirming cost award and awarding costs for appeal).)

9 Any argument that AFSCME is not a prevailing party here because the Court did not  
10 designate AFSCME as a prevailing party for the purposes of an award of *costs* is to no avail; it is  
11 clear from the judgment that that determination was made with respect to Code of Civil Procedure  
12 section 1032. Courts recognize that “a ‘successful party’ within the meaning of Code of Civil  
13 Procedure section 1021.5 [attorney fees] is not the same as the definition of the “prevailing party”  
14 pursuant to Code of Civil Procedure section 1032 [costs of litigation] ....” (*Ventas Finance I, LLC v.*  
15 *California Franchise Tax Bd.* (2008) 165 Cal.App.4th 1207, 1234.)<sup>2</sup> In fact, “a plaintiff’s partial  
16 success is [simply] a factor considered in determining the amount of any fee award.” (*Robinson v.*  
17 *City of Chowchilla* (2011) 202 Cal.App.4th 382, 393 (citing *Sokolow v. County of San Mateo* (1989)  
18 213 Cal.App.3d 231 (“a reduced fee award is appropriate when a claimant achieves only limited  
19 success”) (hereinafter “*Robinson*”).) As a result, AFSCME is a successful party for purposes of an  
20 attorneys’ fee award.

## 21 2. The Vindication of Constitutional Rights Constitutes an Important Public Right

22 Our Supreme Court noted that the vindication of constitutionally-based rights “would have  
23 little meaning ... without some mechanism authorizing the award of attorneys fees.” (*See Press v.*  
24

25 <sup>2</sup> There are many examples of prevailing party plaintiffs who have only succeeded partially in  
26 litigation. For example, in *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, a neighborhood  
27 group whose case the court described as “largely unsuccessful” was still the prevailing party for  
28 purposes of the attorneys’ fee statute despite only succeeding on one of its six causes of action. (*See*  
*also Lyons v. Chinese Hosp. Ass’n* (2006) 136 Cal.App.4th 1331 (plaintiff contractor prevailing party  
when he obtained injunctive relief despite failing to prevail on damages claim).)

1 *Lucky Stores* (1983) 34 Cal.3d 311, 318-19 (hereinafter “*Press*”).) In accordance with this  
2 understanding, the private attorney general (“PAGA”) attorney fee doctrine recognizes that:

3  
4 [P]rivately initiated lawsuits are often essential to the effectuation of  
5 the *fundamental public policies embodied in constitutional* or statutory  
6 provisions, and that, without some mechanism authorizing the award of  
attorney fees, private actions to enforce such important public policies  
will as a practical matter frequently be infeasible.

7 (*Woodland Hills Residents Ass’n, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 933  
8 (emphasis added) (hereinafter “*Woodland Hills*”).) The present case is a prime example of one in  
9 which an important policy was vindicated in the course of defending a constitutional right. (*Press*,  
10 *supra*, 34 Cal.3d at 318 (“determination that the public policy vindicated is one of constitutional  
11 stature ... establishes the first of the ... elements requisite to the award (i.e., the relative societal  
12 importance of the public policy vindicated).”) (internal citation omitted) ; *see also San José Police*  
13 *Officers Assoc.*, 96 Ops. Cal. Atty. Gen. 1 (2013) (granting POA leave to sue *in quo warranto* and  
14 concluding that question of whether Measure B validly enacted “is in the public interest”);  
15 *Bakersfield Police Officers Assoc.*, 95 Ops. Cal. Atty. Gen. 31 (2012) (granting leave to sue *in quo*  
16 *warranto* over validity of pension reform measure and stating, “[W]e conclude that the question of  
17 Measure D’s validity, and that of the ordinances that it gave rise to, are matters of public interest, and  
18 that it would therefore serve the public interest for them to be properly adjudicated.”).)

19 California has long championed retirement security for public sector workers, and vested  
20 pension rights are protected from impairment under the state’s Contracts Clause. (*Kern v. City of*  
21 *Long Beach* (1947) 29 Cal.2d 848, 853.) “[U]nder California law there is a strong preference for  
22 construing governmental pension laws as creating contractual rights for the payment of benefits.  
23 Where it is feasible to do so the enactment of a governmental pension plan should be construed as  
24 guaranteeing full payment to those entitled to its benefits with the provision of adequate funds for  
25 that purpose.” (*Walsh v. Bd. of Admin.* (1992) 4 Cal.App.4th 682, 698 (hereinafter “*Walsh*”).) In  
26 large part, this is because of the important policy goals behind public sector pensions: (1)  
27 “[P]roviding subsistence for the old age or disability of individual employees and their dependents,”  
28 and (2) “[I]nducing qualified persons to enter and continue in public service.” (*Id.* at 703-04.) The

1 first public policy purpose is especially important, given the fact that San José’s employees are not  
2 entitled to Social Security benefits for work performed during their tenure as City employees. (*See*  
3 Exh. 5101, p. 1; Tr. 105:19-26; 379:12-15.) In fact, the City recognized both policy goals when it  
4 promulgated the Federated City Employees Retirement System:

5  
6 The purpose of this Chapter 3.20 is to provide a means whereby  
7 employees of the city receiving a monthly compensation for city  
8 service in its classified and unclassified civil service ... who become  
9 incapacitated as a result of age or disability may be replaced by more  
10 capable employees, thus promoting economy and efficiency in the  
public service without prejudice and without inflicting a hardship upon  
the employees removed, and at the same time to recognize a public  
obligation to such public employees as may become incapacitated, by  
making provisions for the retirement of aged and disabled employees  
by the payment of retirement benefits.

11 (SJMC § 3.20.010; *see also* SJMC § 3.28.010(B) (“Notwithstanding any provision of the code to the  
12 contrary, the elements of the retirement plan as set out in Chapters 3.16, 3.20, 3.24 and 3.28 are  
13 components of a single retirement system known as the Federated City Employees Retirement  
14 Plan.”).)

15 AFSCME’s successful challenge to sections 1506-A, 1507-A, 1510-A, and part of 1512-A(a)<sup>3</sup>  
16 of Measure B assures its members, other City employees, and retirees that, with respect to their  
17 defined benefit pension plan and COLA benefits, Measure B will not detrimentally effect their  
18 retirement expectations and security; it also gives current employees less of a reason to leave City  
19 service. Furthermore, the Court’s decision has significant implications for public sector workers  
20 throughout the state and even the country. (*See Baggett v. Gates* (1982) 32 Cal.3d 128, 143 (rights  
21 deemed matters of statewide concern sufficiently important to justify fee award).) Nationwide, local  
22 governments contemplating changing their retirement systems to the detriment of their workers  
23 followed this case to determine Measure B would open the door to similar legislation elsewhere.  
24 (*See, e.g.,* Declaration of Teague P. Paterson in Support of Motion for Attorneys’ Fees (“Paterson  
25 Decl.”), ¶ 17, Exh. B (<http://www.davisvanguard.org/all-eyes-on-san-jose-pension-reform-fight/>).)  
26 The fact that this case received nationwide attention is bolstered by the fact that a law firm based out

27  
28 <sup>3</sup> The partial success with respect to Section 1512-A(a) also assures members that they will not have  
to contribute towards any more than 50% of the cost of retiree healthcare.

1 of Washington, D.C., co-authored an amicus brief on behalf of a non-profit organization in support of  
2 the City's motion for summary adjudication. (Paterson Decl., ¶ 18, Exh. C.)

3 As it did for the workers of San José, AFSCME's victory in this case reaffirmed the state's  
4 vested rights doctrine and provided public sector workers elsewhere concerned with the security of  
5 their retirement benefits with some relief. As such, this litigation vindicated an important public  
6 right.

7 Finally, this case tested the constitutionality of a charter amendment adopted pursuant to the  
8 vote of the City's electorate. Since the state Constitution affords citizen participation in the voting  
9 process utmost protection and this lawsuit challenged an act of the electorate, this case necessarily  
10 involved issues of public interest. (*See City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43,  
11 73.)

12 3. The Action Conferred a Significant Benefit on a Large Class of Persons

13 "[T]he extent of the public benefit need not be great to justify an attorney fees award."  
14 (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 984  
15 (citation omitted).) "[T]he 'significant benefit' that will justify an attorney fee award need not  
16 represent a 'tangible' asset or a 'concrete' gain but, in some cases, may be recognized simply from  
17 the effectuation of a fundamental constitutional or statutory policy." (*Woodland Hills, supra*, 23  
18 Cal.3d at 939.) "The benefit may be conceptual or doctrinal," and, in fact, it "can involve ...  
19 clarifying important constitutional principles." (*In re Adoption of Joshua S.* (2008) 42 Cal.4th 945,  
20 958; *Environmental Protection Information Center v. California Dept. of Forestry and Fire* (2010)  
21 190 Cal.App.4th 217, 233 (award or benefits can involve somewhat intangible rights).)

22 The Court's judgment rendered portions of Measure B unconstitutional and preserved pension  
23 rights not only for AFSCME's members and retirees, but for *all* of the City's employees and retirees.  
24 In fact, there are over a thousand Federated System members that AFSCME does not represent, and  
25 these people also benefited from the lawsuit. (Decl. of Charles Allen, ¶¶ 3-6, Exh. A.) Given the fact  
26 that "hundreds" of workers constitute a "large class of persons" for purposes of PAGA fees  
27 entitlement (*Monterey/Santa Cruz County Bldg. and Const. Trades* (2011) 191 Cal.App.4th 1500,  
28

1 1523<sup>4</sup> (hereinafter “*Monterey/SC*”)), the action here benefited a large class of persons within the City  
2 of San José.

3 Furthermore, although the case did not result in a direct monetary award to AFSCME, its  
4 disposition reaffirmed the state’s “vested rights doctrine” and public employees’ rights to pension  
5 benefits under the Contracts Clause. (See *Northwest Energetic Services, LLC v. Franchise Tax Bd.*  
6 (2008) 159 Cal.App.4th 841, 876-77 (plaintiff foreign company conferred significant benefit on large  
7 class of persons where statute allowing levy on LLCs registered to do business in California deemed  
8 unconstitutional pursuant to Commerce Clause).) Notably, the Court rejected the City’s primary  
9 contention that two ambiguously-worded “Reservation of Rights” clauses prevented the vesting of  
10 pension rights as a matter of law. Had the City prevailed with this argument, it would have turned the  
11 entire “vested rights” doctrine on its head; such a result would have led local governments throughout  
12 the state to slash pension benefits and increase employee contribution rates based upon the authority  
13 of similar clauses in their respective charters or operative documents. As such, the judgment  
14 provides some degree of comfort for all California public sector employees working for agencies or  
15 municipalities contemplating decreasing their retirement security.

16 4. The Union Bore the Burden of Private Enforcement

17 The PAGA doctrine “rests upon the recognition that privately initiated lawsuits are often  
18 essential to the effectuation of the fundamental public policies embodied in constitutional or statutory  
19 provisions, and that, without some mechanism authorizing the award of attorney fees, private actions  
20 to enforce such important public polices will as a practical matter frequently be infeasible.

21 [Citations.]” (*Woodland Hills, supra*, 23 Cal.3d at 933.) This is one such case.

22 First, private enforcement was particularly necessary here because Measure B was the City’s  
23 product, and the City is responsible for adopting ordinances implementing its provisions.<sup>5</sup> Private  
24 enforcement is proper in such situations. (*Woodland Hills, supra*, 23 Cal.3d at 941 (“Inasmuch as the

25 <sup>4</sup> “Hundreds of construction workers is a ‘large class of persons,’ and the fact that many of these  
26 workers would not be union members further demonstrated that this action conferred benefits which  
transcended plaintiffs’ stake in the matter.” (*Ibid.*)

27 <sup>5</sup> In fact, the City prematurely filed suit in federal court before its electorate even approved Measure  
28 B and before any plaintiff in this action filed suit challenging the referendum.

1 present action proceeded against the only governmental agencies that bear responsibility for the  
2 subdivision approval process, the necessity of private, as compared to public, enforcement becomes  
3 clear.”).)

4 Next, the financial burden of private enforcement is such as to make the award appropriate.  
5 Importantly, AFSCME’s lawsuit only sought to preserve the status quo as it existed prior to Measure  
6 B’s enactment. AFSCME did not seek to gain any benefit in excess of that status quo and, in fact, the  
7 litigation resulted in significantly less than that status quo.

8 Furthermore, AFSCME’s success in this case does not necessarily guarantee pecuniary  
9 benefit to City employees, because said employees still need to fulfill requisite conditions to enjoy  
10 the benefits secured in this case.

11 *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, involved a fee  
12 dispute following a lawsuit by which the plaintiffs successfully challenged the constitutionality of a  
13 city ordinance limiting contributions to campaign committees for or against municipal ballot  
14 propositions. The court held that plaintiffs, who had opposed a rent control initiative in Berkeley,  
15 received no direct pecuniary benefit from the litigation because the “freedom from the contribution  
16 limit by no means guaranteed defeat of the initiative measure, only the chance to more vigorously  
17 oppose its passage.” (*Id.* at 230.)

18 Over twenty years later in *Monterey/SC*, a union action resulted in the enforcement of a  
19 prevailing wage law against a developer employing both union and non-union workers. The  
20 appellate court in that case affirmed the trial court’s award of attorney fees and agreed that the  
21 plaintiffs’ financial burden of the fees far exceeded the litigation’s financial value because their  
22 “pecuniary benefit will be indirect and uncertain.” (191 Cal.App.4th at 1523.)

23 As was the case in *Monterey/SC*, the mere rendering of Sections 1506-A, 1507-A, and 1510-A  
24 as unconstitutional does not result in a direct pecuniary benefit to AFSCME members, as AFSCME’s  
25 complaint did not pray for and the Union was not awarded economic damages.<sup>6</sup> Rather, AFSCME  
26 secured the rights of its members and other City employees to earn pension benefits under the terms

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28 <sup>6</sup> It is also worth reiterating that, after the City adopted a charter amendment impairing its employees’  
vested pension rights, it then affirmatively sued AFSCME and other City unions.

1 of the Federated System in place prior to Measure B upon satisfaction of the requisite conditions.  
2 With respect to section 1506-A, each member must remain employed with the City in order to see a  
3 monetary benefit from the more advantageous pension contributions formula. Furthermore, each  
4 member must remain employed and retire in accordance with the provisions of the Federated System  
5 in order to realize an economic benefit from the rendering of sections of 1507-A and 1510-A as  
6 unconstitutional. AFSCME's victory in no way assures that its members and other City employees  
7 will satisfy said conditions.

8 Notably, section 1514-A of Measure B ("Poison Pill"), which the Court upheld, diminishes  
9 the value of any indirect economic recovery a City employee might realize from the Court's decision.  
10 That section explicitly authorizes the City to offset the cost savings it could have realized under  
11 section 1506-A through an equivalent level of reductions to its employees' pay. As such, AFSCME  
12 members and City employees might not even realize much of an economic savings from the non-  
13 enforceability of Section 1506-A. Nonetheless, the Union has expended considerable monetary  
14 resources prosecuting a case which has positive implications for public sector employees in San José  
15 and throughout the country.

16 5. Equities Favor Attorney Fee Award

17 Because AFSCME did not realize monetary recovery from this litigation, there is no  
18 "recovery" from which to pay fees, and this prong is inapplicable. (*Baggett v. Gates* (1982) 32  
19 Cal.3d 128, 142 fn. 17.) Nonetheless, the equities tip in favor of AFSCME given the facts that it had  
20 to expend substantial financial resources to challenge an aggressively unconstitutional referendum  
21 and because it risked invoking Measure B's Poison Pill in the event it defeated section 1506-A.

22 **B. The Attorneys' Fees Sought by Plaintiff/Petitioner Are Reasonable**

23 In awarding attorneys' fees, courts generally apply the "lodestar" and multiply the number of  
24 hours reasonably expended by the reasonable hourly rate. (*Press, supra*, 34 Cal.3d at 311.)  
25 "Reasonably hourly rate" is the "prevailing rate in the community for similar work." (*PLCM Group*  
26 *Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (hereinafter "*PLCM*").) Courts consider the experience  
27 and expertise of attorneys and the market rates for attorneys of comparable experience and expertise.  
28 (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 640-43 & fn. 31 (hereinafter "*Serrano*").)



1 Prevailing parties are entitled to compensation for “all the hours reasonably spent.” (*Ketchum*  
2 *v. Moses* (2001) 24 Cal.4th 1122, 1133.) This includes time spent raising and developing alternative  
3 yet unsuccessful theories. (*Sundance v. Mun. Ct.* (1987) 192 Cal.App.3d 268, 273-74 (internal  
4 quotations omitted).) Also, when issues “are so interrelated that it would have been impossible to  
5 separate them into claims for which attorney fees are properly awarded and claims for which they are  
6 not, then allocation is not required” and all expenses incurred on the common issues qualify for an  
7 award. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133 (citing cases).)  
8 Furthermore, “absent circumstances rendering the award unjust,” fees and expenses incurred in  
9 bringing and defending this instant motion are also recoverable. (*Serrano, supra*, 32 Cal.3d at 639.)

10 A court may adjust the lodestar figure based on particular circumstances of a case in order to  
11 “fix the fee at the fair market value for legal services provided.” (*PLCM, supra*, 22 Cal.4th at 1095.)  
12 Thus, the “trial court makes its determination after consideration of a number of factors, including the  
13 nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill  
14 employed, the attention given, the success of failure, and other circumstances of the case.” (*Id.* at  
15 1096 (citation omitted).)

16 The billing entries attached to the Paterson Declaration indicate that this matter was ably and  
17 efficiently pursued on behalf of Petitioner. Further, the hourly rate for all attorneys on which the fee  
18 request is based, \$275.00, is well within, and in the case of Teague Paterson well below, the range  
19 awarded by courts for similar legal services performed by similarly qualified attorneys in this  
20 geographic area. (*See Paterson Decl.*, ¶¶ 4-12).<sup>7</sup> Another court recently awarded Mr. Paterson, the  
21 lead attorney pursuing this action on behalf of petitioner, fees at the reasonable hourly rate of \$450  
22 per hour, and in an earlier but similar case awarded a \$350 rate. (*Paterson Decl.*, ¶ 11.) Mr. Paterson  
23 is a partner with fifteen years of experience in representing retirement and health and welfare benefit  
24 plans, unions, and individual employees, and is a contributing author to the third edition of the BNA  
25 treatise *Employee Benefits Law*. (*Paterson Decl.*, ¶ 3.) He has also lectured throughout the country  
26 on this very topic: state and local pension reform efforts. (*Ibid.*) Moreover, the rate sought is less  
27 than is typically charged by attorneys of like experience in the San Francisco Bay Area. (*See*

28 <sup>7</sup> Summer law clerk time was billed at \$100 per hour. (*Paterson Decl.*, ¶ 6.)

1 Paterson Decl., ¶¶ 4-12.) Other courts in California have approved higher rates for similar work.  
2 (*Ibid.*)

3 In sum, based on the experience of the attorneys involved, the amount of time expended in  
4 pursuing this action as indicated in time/billing entries, and the reasonable rates applied to such time,  
5 the fees sought through this motion are fair and reasonable.

6 In the alternative, AFSCME respectfully requests a fee award for its efforts in successfully  
7 opposing Sections 1506-A, 1507-A, 1510-A, and part of Section 1512-A(a) of Measure B.  
8 (*Robinson, supra*, 202 Cal.App.4th at 393 (“a plaintiff’s partial success is [simply] a factor considered  
9 in determining the amount of any fee award.”).)<sup>8</sup> This would include work related to defeating the  
10 City’s contention that purported “reservation of rights clauses” within the City Charter defeated the  
11 creation of vested rights.

## 12 V. CONCLUSION

13 For the foregoing reasons, and for those set forth in Plaintiff/Cross Defendant San José Police  
14 Officers’ Association’s motion for attorneys’ fees, AFSCME is entitled to an award of attorneys’ fees  
15 pursuant to Code of Civil Procedure section 1021.5 in the amount of \$463,066.25.

16 Dated: July 30, 2014

BEESON, TAYER & BODINE, APC

17  
18 By: 

TEAGUE P. PATERSON

VISHTASP M. SOROUSHIAN

Attorneys for Plaintiff AFSCME Local 101

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28 <sup>8</sup> AFSCME can provide such a cost breakdown upon request of the Court.

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**PROOF OF SERVICE**

**SANTA CLARA SUPERIOR COURT**

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

**MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF  
MOTION FOR ATTORNEYS' FEES**

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☒ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**SEE SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, July 30, 2014.

  
\_\_\_\_\_  
Esther Aviva

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